Final Report
August 20, 2016

Electronic Search Warrant Workgroup

On May 11, 2016, Chief Justice VandeWalle established a workgroup on search warrants in anticipation of the U.S. Supreme Court ruling in *Birchfield v. North Dakota*. A list of the Workgroup members is contained in Appendix A. The anticipated ruling was expected to expand the need for search warrants for blood, and potentially breath, tests when an individual is stopped for suspicion of driving under the influence. Because the law relies on the test being taken within two hours of a stop for DUI, the Chief Justice charged the workgroup with developing a recommendation for a statewide response to the need to respond to warrant requests for DUI stops in a consistent, timely, and efficient manner. Specifically, the workgroup was asked to address four questions:

1. Who will respond to requests for search warrants?
2. To what extent should state's attorneys be involved in the search warrant process?
3. How can the court system leverage technology to address search warrant requests in an expedited manner?
4. Are there any rules or statutory amendments needed to allow for a more time-sensitive search warrant process?

The Workgroup received information in the chart below from the North Dakota Department of Transportation regarding the number of DUI tests refusals over the past few years. The Department of Transportation does not collect data on whether the refusal was for a breath or blood test.

Calendar Year	Number of Refusals
2015	1,037
2014	1,273
2013	1,330
2012	1,591
2011	1,181

The U.S. Supreme Court subsequently ruled in *Birchfield* that a search warrant is required for blood tests but not for breath tests.

I. Response to Search Warrants

In regard to the first issue of who should respond to search warrant requests, the Workgroup debated whether a single statewide on-call system utilizing a single point of contact, such as a phone number or email address, or a district-by-district on-call system would be most effective in providing quick and reliable access to a judge who is available to review an application for a search warrant regardless of the time of day.

Several factors were identified as an impediment to creating a statewide on-call system. Of primary concern is that a district court judge's jurisdiction is limited to the district in which the judge is elected. This issue would need to be addressed by temporary appointments made by the Chief Justice or a rule or statutory change before a judge could exercise statewide jurisdiction to issue search warrants. There would also be a need to train law enforcement and prosecutors regarding the protocols and practical implementation aspects of a statewide on-call system. Both of these factors would have a direct impact on how quickly a solution could be rolled out. Other considerations involved the various, long-established practices within each district, and the varying role of prosecutors in the warrant process as currently required within each district. Because of the time constraints imposed by the need to respond to the changes following the *Birchfield* decision, the uncertainty of the impact on judicial workload, and law enforcement's familiarity with the district practices within their jurisdiction, **the Workgroup recommends that the state respond to search warrant requests on a district basis. This recommendation is predicated on the directive that every district develop a written, on-call judge rotation and that the rotation be regularly updated and distributed to all law enforcement agencies within the respective judicial districts**.

Recognizing that in addition to state and county officials, municipal law enforcement agencies have a significant role in enforcing DUI laws, the Workgroup discussed the role of municipal judges in issuing search warrants. The Workgroup reviewed the authority of municipal judges under N.D.C.C. 40-18 and Administrative Rule 30, the authority of magistrates under N.D.C.C. 27-05-31 and Administrative Rule 20, the administrative authority of the Chief Justice and Supreme Court as established by the North Dakota Constitution, and Attorney General opinions 99-L-132(issued 12-30-1999) and 02-L-03(issued 01-04-2002). The Workgroup concluded that a municipal judge has the authority to issue a search warrant only if the judge has been appointed a magistrate by the presiding judge of the district in which the municipality is located. It was the consensus of the Workgroup that if municipal judges are included as part of a district's on-call rotation, that this be limited to only law-trained municipal judges.

The Workgroup was divided on whether it was necessary to include municipal judges in an on-call rotation. The primary factor in favor of including municipal judges was the large number of DUI cases that originate from municipal law enforcement stops which are subsequently handled through the municipal court. The primary factors in opposition to including municipal judges was current local practice where all search warrant requests are being handled by district judges regardless of the agency making the request, and the uncertainty as to the future impact on workload created by the *Birchfield* decision.

The municipal judges were surveyed on this issue. Of the five responses received, four were opposed and one was in favor. Reasons for opposing inclusion included the additional, unfunded

costs to the municipality, the part-time status of the judges, and the lack of recording equipment and personnel to transcribe recordings since municipal courts are not courts of record. Reasons for favoring inclusion included existing authority to carry out this function and current local practice.

There was discussion on whether a presiding judge could compel a municipal judge to accept authority as a state magistrate by amending the presiding judge's AR 30 magistrate order to include this authority and then placing the municipal judge in the district's on-call rotation. The Workgroup concluded that while this may be possible, the political considerations in doing so outweigh the potential gain, particularly since the impact of the *Birchfield* decision is still unknown.

For all of the reasons indicated above, the **Workgroup recommends that the review of search warrant applications be restricted to district court judges, except in those jurisdictions where law-trained municipal judges or licensed attorneys have agreed to serve as magistrates.**

II. State's Attorney Involvement

In regard to the second issue of involvement of the state's attorney in the search warrant process, the Workgroup reviewed the current local practice for each district. In three judicial districts law enforcement is required to seek the assistance of the prosecutor prior to submitting an application for a search warrant. In five judicial districts the prosecutor's role is limited to the extent that law enforcement determines it is necessary. There is a concern that if law enforcement is contacting judges directly they will expect the judge to provide legal advice to them as to any deficiency in the application. However, it was determined that this concern could be alleviated to some degree with careful conduct by the judge and by a process where the judge can reject a search warrant application without comment. Additionally, the Workgroup determined that it may be possible to create a technological solution for reviewing and issuing search warrants which could be written to allow for the option of requiring a state's attorney to sign off on, or comment on, a search warrant application prior to it reaching the judge.

The state's attorneys were surveyed regarding their position on this issue and were divided in their response. Those that are currently involved in the search warrant process would prefer to continue in that role while those that are not currently involved would prefer to remain uninvolved. Some state's attorneys also raised the question of whether municipal prosecutors should be involved in and responsible for the search warrant applications that may be needed by municipal law enforcement.

The Workgroup also considered the extent to which municipal prosecutors should be involved in the search warrant process. The Workgroup was unaware of any district in which the municipal prosecutor is currently required to be involved in the search warrant process. Workgroup member Aaron Birst contacted several municipal prosecutors to ascertain their position on whether or not municipal prosecutors should be involved in the process. He reported that no municipal prosecutor was in favor of the idea. The concerns raised by the municipal prosecutors largely echoed those raised by the municipal judges.

After considering the information received, **the Workgroup recommends that the involvement of the state's attorney and municipal prosecutors be determined on a district basis, depending on local practice and the need for additional resources if the volume of search warrant requests increases significantly.**

III. Use of Technology

In regard to the third issue of leveraging technology, the Workgroup reviewed the provisions of Rules 4.1 and 41 of the North Dakota Rules of Criminal Procedure. These rules currently allow a magistrate to issue a warrant using information received by telephone or other reliable electronic means. The rules require that any testimony taken through these methods, beyond merely swearing to the contents of the written document, must be recorded verbatim. The rules also require the magistrate and the applicant to create duplicate written copies of the warrant application and warrant and file both versions along with the verbatim record of the proceeding with the clerk of court.

The Workgroup discussed the requirement to record testimony verbatim and to ensure that the recorded testimony is filed. The Workgroup learned that the practice for obtaining and filing recordings of the testimony vary by judge and by district. In some districts, the judge records the testimony and the judge's court reporter or court recorder transcribes the tape on the next work day. The transcript is then filed with the search warrant application. In other districts, the judge uses a conference call service and purchases a recording of the call from the vendor. The CD is then filed with the clerk of court. Some judges use a conference call service and purchase a digital audio file from the vendor. The digital audio file is then transcribed by the court recorder and filed with the warrant. Some judges have law enforcement officials make the telephone call through their dispatch center which records the call and the dispatch center maintains the record of the call. Some judges have law enforcement officials make the telephone call through State Radio which will record the call. State Radio will then copy the recording to a CD or digital audio file and forward it to the judge for filing.

The Workgroup was informed by member Mike Lynk that State Radio services are available to all law enforcement officials in the state at no cost to the agency. The Workgroup learned that State Radio may be able to accommodate more use of its services if there is a significant increase in the number of search warrants being requested. However, State Radio would need some time to work with the state's Information and Technology Department to review options on adding a dedicated search warrant line that could host multiple conference calls simultaneously. Mr. Lynk also raised concerns about the potential impact of a large increase of calls on State Radio staff and the additional cost of storing numerous digital audio files on servers owned by State Radio. The Workgroup was informed that a web-based solution could be built to include the ability for State Radio to drop the digital files onto the website where they would be stored on servers owned by the Court System.

The Workgroup solicited information on how various district court judges are currently reviewing and issuing warrants and on the type of technology currently being used by law enforcement. Additionally, at the suggestion of Workgroup member Judge Hagerty, she, Judge

Marquart and Judge Tufte provided a demonstration to the members of the Judges Association, on how each of them is currently using technology to review and issue search warrants.

The Workgroup learned that while many district court judges are very comfortable using technology, some are less comfortable with it. The Workgroup heard that some judges would prefer to continue to have the option of issuing warrants by telephone or requiring law enforcement officers to appear personally before them with the search warrant application.

The Workgroup discussed the need to have a "platform agnostic" solution which would allow a judge or law enforcement official to utilize the solution regardless of whether they were using a cell phone, tablet, laptop or personal computer. The Workgroup discussed the need to maintain an alternative solution for those law enforcement agencies that lack some technology, such as printers, in their squad cars. At the suggestion of Workgroup member Judge Racek the group considered incorporating the use of cell phone-created photos into a web-based solution.

The Workgroup heard concerns from some judges about using their personal cell phone or computer to use a web-based search warrant process to do official business. The Workgroup learned that the web-based solution being proposed would be housed on the Court's servers, and as such, none of the information would be retained or stored on the device used to access the website. The Workgroup discussed the option of providing low-end, low-cost technology that is internet capable to judges if the number of after-hours search warrant requests increases substantially.

The Workgroup discussed the need to create a template for a search warrant application for a blood test that could be incorporated into a web-based solution that would eliminate the need for law enforcement officials to have a printer in their squad car. The Workgroup identified a concern that approving a template would be inappropriate since a district court judge may be required to rule on the sufficiency of the documents. The Workgroup considered other types of forms created by court committees and the self-help center and the disclaimers that accompany those forms. After discussion, the Workgroup concluded that it would be more appropriate for the template to be developed by the State's Attorneys Association and for the web-based solution to be built in a manner that will allow individual law enforcement officials or prosecutors to upload alternate documents if they choose not to use the built-in template. A sample template can be found in Appendix B.

The Workgroup recommends a web-based solution that will allow law enforcement to input data into a template approved by the State's Attorneys Association, and allows for documents to be uploaded if a state's attorney or law enforcement official chooses not to use the template. The Workgroup further recommends that the web-based solution allow for an officer to upload a cell phone photo of a handwritten form if the law enforcement official lacks a printer or laptop in their squad car.

IV. Statutory or Rule Amendments

In regard to the fourth issue regarding any statutory or rule amendments that are needed, the Workgroup concluded that use of telephone and other technology to review and issue warrants is

already allowed and no further amendments are needed in that regard. The Workgroup identified one area in which N.D.R.Crim.P. 41 could be amended to increase efficiency and save costs.

Currently there is a requirement that an individual making a search warrant application must sign the application under oath. This requires either a printed document that is notarized or that a judge has verbal contact with the applicant to put him or her under oath to attest to the content of the application. If verbal contact is made, it must be recorded verbatim. Amending the rule to allow the applicant to attest to the contents of the application under penalty of perjury would resolve these issues and reduce the times when a recording and transcript are needed to only those instances when a judge requires the applicant to supplement the search warrant application with additional information. For those reasons, **the Workgroup recommends that N.D.R.Crim.P. 41 be amended as shown in Appendix C.**

V. Other Issues

Throughout the course of its meetings, the Workgroup became aware of several other issues that are of concern to law enforcement but are outside the scope of the Workgroup. These issues are noted here without any recommendation.

The Workgroup learned that certification to administer the Intoxilyzer test is conducted by the North Dakota Bureau of Criminal Investigation. The infrequency of the classes, limits on class size and the length of the training have led to the current situation in which few officers are certified to administer the test. Following the release of the *Birchfield* decision, the Workgroup heard that the BCI intends to shorten the training and to offer several classes in the coming year.

The Workgroup learned that hospitals may refuse to honor a search warrant for a blood draw unless the patient consents to the procedure because to do otherwise may be a violation of patient care practices. The Workgroup also learned that some hospitals may charge the law enforcement agency for the cost of the blood draw.

Respectfully submitted,

Sally A. Holewa
State Court Administrator

Appendix A

SEARCH WARRANT WORKGROUP

MEMBERS

Judge Gail Hagerty, Presiding Judge SCJD

Judge Gary Lee, Presiding Judge NCJD

Judge Daniel Narum, Presiding Judge SEJD

Judge David Nelson, Presiding Judge NWJD

Judge Frank Racek, Presiding Judge ECJD

Judge Bill Severin, Bismarck Municipal Judge

Aaron Birst, Legal Counsel for the North Dakota Association of Counties and Executive Director of the North Dakota State's Attorneys Association

Scott Johnson, Unit 1 Court Administrator

Chief Michael Reitan, West Fargo Police Department

Lt. Tom Iverson, North Dakota State Patrol

Mike Lynk, Director of State Radio, Dept. of Emergency Services

Staff

Sally Holewa, State Court Administrator

Jim Ganje, Staff Attorney

Mike Hagburg, Staff Attorney

Jeff Stillwell, Programmer

Larry Zubke, Director of Technology

Appendix B

DUI Search Warrant Application and Authorization

Date of Occurrence	Time of Driving/Physical Control/Crash ☐ A.M. ☐ P.M.	Time of Arrest/Lawfully Detained ☐ A.M. ☐ P.M.	Citation Number

Suspect's Name (Last, First, and Middle)

Suspect's Residence Address	City	State	Zip Code

Area Code & Phone Number	County of Occurrence	City of Occurrence	Enforcement Agency

DLN	State	Date of Birth	Class	Endorsement	Rest Code	Sex	Height	Weight

On the above date, there existed reasonable suspicion to believe that the above-named person committed a violation of law justifying an investigatory seizure:
□ erratic driving □ traffic violation □ crash □ already stopped
Explain:

The above named person exhibited signs of impairment from alcohol and/or drugs:
□ odor of alcoholic beverage □ slurred speech □ blood shot watery eyes □ poor balance □ admissions of alcohol/drug use
□ failed field sobriety test(s)
Explain tests offered and suspect's performance: _____
_____
_____

The above named person was advised of the implied consent advisory and was requested to take a screening test:
□ Screening test was failed □ Screening test was refused □ Screening test not applicable because drug impairment

The above named person was placed under arrest and informed that he or she will be charged with the offense of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs.
Location of Arrest:

Arrestee was again advised of the implied consent advisory and requested to take a □BLOOD □BREATH □URINE evidentiary test:
□ Refused requested test
Explain basis for refusal:_____

Officer's training and experience relevant to impaired driving detection:
Explain: _____

Additional evidence supporting Probably Cause to believe the above named individual's body contains evidence of impairing substances:
Explain: _____

I personally certify as a law enforcement officer the facts contained in this search warrant application is true and correct to the best of my knowledge at the time of writing.

_____ _____
Name of Officer/Badge or ID Number (PLEASE PRINT) Signature of Officer/Badge or ID Number

Dated this _____ day of (MM/CCYY) _____ SWORN TO AND SUBSCRIBED ____ of _____ 20__
Notary

Judicial Order Authorizing a Search of the above named person

Based upon the affidavit of the above officer, I am satisfied that there is probable cause to believe the above named suspect's body contains evidence of operating a vehicle under the influence of alcohol or drugs in violation of NDCC § 39-08-01. I hereby **ORDER**:
1) Affiant shall immediately and personally serve a copy of this search warrant on the suspect;
2) Affiant (or any other peace officer) is ordered to seize and secure a sufficient sample of the accused's whole blood by a physician, physician's assistant, registered nurse, emergency medical technician, chemist, nurse practitioner or other qualified technician for the purpose of conducting a scientific test for determining the alcoholic content of the accused's blood and/or the presence of any controlled dangerous substance and/or other impairing drug(s) in the suspect's blood;
3) Affiant shall preserve the original executed affidavit for the search warrant and the faxed return of the affidavit and search warrant signed by the judge.

This warrant may be executed any time of the day or night but must be executed within 4 hours from the order.

_____
North Dakota District Court Judge Issued this _____day of_____, 20____, at _____AM/PM

Appendix C

N.D.R.Crim.P.

RULE 41. SEARCH AND SEIZURE

(a) Authority to Issue a Warrant. A state or federal magistrate acting within or for the territorial jurisdiction where the property or person sought is located, or from which it has been removed, may issue a search warrant authorized by this rule.

(b) Persons or Property Subject to Search and Seizure. A warrant may be issued for any of the following:

(1) property that constitutes evidence of a crime;

(2) contraband, the fruits of crime, or things criminally possessed;

(3) property designed or intended for use, or which is or has been used as the means of, committing a crime;

(4) a person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuing the Warrant.

(1) Warrant on Affidavit or Sworn Recorded Testimony.

(A) In General. A warrant other than a warrant on oral testimony under Rule 41 (c)(2) may issue only ~~on~~ when the grounds for issuing the warrant are established in:

(i) a written declaration by a licensed peace officer made and subscribed under penalty of perjury, or

(ii) an affidavit or affidavits sworn to or sworn recorded testimony taken before a state or federal magistrate ~~and establishing the grounds for issuing the warrant~~.

(B) Examination. Before ruling on a request for a warrant, the magistrate may require the affiant or other witnesses to appear personally and may examine under oath the affiant and any witnesses the affiant may produce. This examination must be recorded and made part of the proceedings.

(C) Probable Cause. If the state or federal magistrate is satisfied that grounds for the application exist or that there is probable cause to believe they exist, the magistrate must issue a warrant identifying the property or person to be seized and naming or describing with particularity the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(D) Command to Search. The warrant must be directed to a peace officer

authorized to enforce or assist in enforcing any law of this state. It must command the officer to search, within a specified period of time not to exceed ten days, the person or place named for the property or person specified.

(E) Service and Return. The warrant must be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It may designate a state or federal magistrate to whom it must be returned.

(2) Warrant by Telephonic or Other Reliable Electronic Means. In accordance with Rule 4.1, the magistrate may issue a warrant based on information communicated by telephone or other reliable electronic means.

(3) Warrant Seeking Electronically Stored Information. A warrant under

Rule 41(c) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(d) Execution and Return With Inventory.

(1) Execution. The person who executes the warrant must enter the date and time of the execution on the face of the warrant.

(2) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of the applicant for the warrant and the person from whom, or from

whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(3) Receipt. The officer taking property under the warrant must:

(A) give a copy of the warrant and a receipt for the property taken to the person from whom or from whose premises the property was taken; or

(B) leave a copy of the warrant and receipt at the place from which the officer took the property.

(4) Return. The officer executing the warrant must promptly return

it—together with a copy of the inventory—to the magistrate designated on the warrant. The officer may do so by reliable electronic means. The magistrate on request must give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move the trial court for the property's return. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the moving party, although the court may impose reasonable conditions to protect access and use of the property in later proceedings. If a motion for return of property is made or heard after an indictment, information, or

complaint is filed, it must be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the trial court as provided in Rule 12.

(g) Return of Papers to Clerk. The magistrate to whom the warrant is returned must attach to the warrant a copy of the return, inventory and all other related papers and must file them with the clerk of the trial court.

(h) Scope and Definitions.

(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) Definitions. The following definitions apply under this rule:

(A) "Property" includes documents, books, papers and any other tangible objects.

(B) "Daytime" means the hours from 6:00 a.m. to 10:00 p.m. according to local time.

EXPLANATORY NOTE

Rule 41 was amended, effective September 1, 1983; March 1, 1990; March 1, 1992 January 1, 1995; March 1, 2006; March 1, 2011; March 1, 2012; March 1, 2013;_____.

Rule 41 is an adaptation of Fed.R.Crim.P. 41 and is designed to implement the provisions of Article I, Section 8, of the North Dakota Constitution and the Fourth Amendment to the United States Constitution, which guarantee, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." To implement this constitutional protection, an illegal search and seizure will bar the use of such evidence in a criminal prosecution. The suppression sanction is imposed in order

to discourage abuses of power by law enforcement officials in conducting searches and seizures.

Subdivision (a) provides that a search warrant be issued by a magistrate, either state or federal, acting within or for the territorial jurisdiction. The provision which permits a federal magistrate to issue a search warrant is the reciprocal of the federal rule, which permits a state magistrate to issue a search warrant pursuant to a federal matter. It is contemplated that a search warrant will be issued by a federal magistrate only on the nonavailability of a state magistrate.

Subdivision (a) does not require that the individual requesting the search warrant be a law enforcement officer. There appears to be common-law support for the use of the search warrant as a means of getting an owner's property back. The primary purpose of the rule, however, is the authorization of a search in the interest of law enforcement and as a practical matter the request for issuance of a search warrant by someone other than a law enforcement officer is virtually nonexistent.

Subdivision (b) describes the property or persons which may be seized with a lawfully issued search warrant. Issuance of a search warrant to search for items of solely evidential value is authorized. There is no intention to limit the protection of the Fifth Amendment against compulsory self-incrimination, so items that are solely "testimonial" or "communicative" in nature might well be inadmissible on those grounds.

Paragraph (c)(1) follows the federal rule except that North Dakota's rule permits the issuance of a warrant on sworn recorded testimony without an affidavit. Probable cause for the issuance of a search warrant should be assessed under the totality-of-circumstances test.

Paragraph (c)(1) was amended, effective _____, to allow grounds for issuance of a search warrant to be established in a written declaration by a licensed peace officer made and subscribed under penalty of perjury.

The provision for examination of the affiant before the magistrate is intended to assure the magistrate an opportunity to make a careful decision as to whether there is probable cause based on legally obtained evidence. The requirement that the testimony be recorded is to insure an adequate basis for

determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if a motion to suppress is later filed.

The language of subparagraph (c)(1)(E), "for reasonable cause shown," is intended to explain the necessity for executing the warrant at a time other than the daytime. This provision is intended to be a substantive prerequisite to the issuance of a warrant that is to be executed at a time other than daytime, although it is not necessary that the quoted language ("for reasonable cause shown") be defined in subdivision (h).

Former paragraphs (c)(2) and (c)(3) were deleted and a new paragraph (c)(2) was added, effective March 1, 2013, to allow the magistrate to issue a warrant based on information communicated by telephone or other reliable electronic means under the procedure set out in Rule 4.1.

Paragraph (c)(3) was added and paragraph (d)(1) was amended, effective March 1, 2012, to provide guidelines for warrants authorizing the seizure of electronic storage media and electronically stored information and for the inventory of seized electronic material. The amendments were based on the December 1, 2009, amendments to Fed.R.Crim.P. 41.

Subdivision (d) is intended to make clear that a copy of the warrant and an

inventory receipt for property taken shall be left at the premises at the time of the lawful search or with the person from whose premises the property is taken if he is present.

Paragraph (d)(4) was amended, effective March 1, 2013, to allow an officer to make a return by reliable electronic means.

Subdivision (e) requires that the motion for return of property be made in the trial court rather than in a preliminary hearing before the magistrate who issued the warrant. It further provides for a return of the property if: (1) the person is entitled to lawful possession, and (2) the seizure is illegal. However, property which is considered contraband does not have to be returned even if seized illegally. The last sentence of subdivision (e) provides that a motion for return of property, made in the trial court, shall be treated as a motion to suppress under N.D.R.Crim.P. 12. The purpose of this provision is to have a series of pretrial motions disposed of in a single appearance, such as at a Rule 17.1 (Omnibus Hearing), rather than in a series of pretrial motions made on different dates causing undue delay in administration.

Subdivisions (a), (b), and (c) were amended in 1983, effective September 1, 1983, to add persons as permissible objects of search warrants. These amendments follow 1979 amendments to Fed.R.Crim.P. 41 and are intended to make it possible for a search warrant to issue to search for a person if there is probable cause to arrest that person; or that person is being unlawfully restrained.

Subdivisions (c) and (d) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Subdivision (e) was amended, effective March 1, 1992, to track the federal rule.

Rule 41 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of January 26-27, 2012, pages 26-27; April 28-29, 2011, page 17; September 23-24, 2010, page 32; April 29-30, 2010, page 20, 25-26; April 28-29, 2005, pages 5-8; January 27-27, 2005, pages 33-34; April 28-29, 1994, pages 22-23; November 7-8, 1991, page 4;

October 25-26, 1990, pages 15-16; April 20, 1989, page 4; December 3, 1987, page 15; October 15-16, 1981, pages 12-15; December 7-8, 1978, pages 23-26; October 12-13, 1978, pages 15-19; April 24-26, 1973, page 14; December 11-15, 1972, pages 31-37; November 18-20, 1971, pages 3-9; September 16-18, 1971, pages 11-32; March 12-13, 1970, page 3; November 20-21, 1969, pages 19-24; May 15-16, 1969, pages 21-23; Fed.R.Crim.P. 41.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-29-02, 29-29-03, 29-29-04, 29-29-05, 29-29-06, 29-29-07, 29-29-10, 29-29-11, 29-29-12, 29-29-13, 29-29-14, 29-29-15, 29-29-16, 29-29-17.

CONSIDERED: N.D.C.C. §§ 12-01-04(12), 12-01-04(13), 29-01-14(3), 29-29-01, 29-29-08, 29-29-09, 29-29-18, 29-29-19, 29-29-20, 29-29-21, 31-04-02.

N.D.C.C. ch. 28-29.1. N.D.C.C. ch.19-03.1.

CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 12 (Pleadings and Pretrial Motions); N.D.R.Crim.P. 17.1 (Omnibus Hearing and Pretrial Conference); N.D.R.Ct. 2.2 (Facsimile Transmission); N.D. Sup. Ct. Admin. R. 52 (Interactive Television).